Seri Mukali Sdn Bhd v Kertih Port Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–1768 OF 2001
ABANG ISKANDAR J
30 APRIL 2010

Contract — Termination — Supply of tugboats delivery specified in letter of award ('LOA) — Breach of — Delay of continuous nature — Termination of LOA — Whether premature and unlawful termination — Whether delay reasonable — Whether a fundamental breach — Whether defendant disentitled from terminating contract — Whether defendant wrongly terminated contract — Whether plaintiff entitled to recover losses suffered — Contracts Act 1950 s 47

The parties herein had agreed to enter into a charter parties ('the charter parties') in which they had pledged that they would use their best endeavour to execute as soon as possible. Pending the execution of the charter parties, the parties had agreed to be bound by the terms and conditions contained in the letter of award ('the LOA'). Pursuant to the LOA, the plaintiff had agreed to supply to the defendant two tugboats, namely the SHEMA and the SHETA. The SHEMA and SHETA were to be delivered on 17 December 1998 and 17 January 1999, respectively. The charter parties in respect of these two tugboats would be for a period of 15 years. In the event of failure to so supply, the plaintiff would be under an obligation to provide the defendant with a substitute tugboat of similar specifications or alternatively, the defendant had the option of procuring the substitute tug itself from other sources. However, the plaintiff had failed to deliver the two tugboats as per the terms as contained in the LOA. There was also non-execution of the charter parties as the plaintiff had failed to append its signature onto it. The plaintiff's claim herein against the defendant was for losses it had allegedly suffered as a direct result of the defendant's 'premature and unlawful termination' of the agreement between them. The defendant however, denied any liability and urged that the claim was misconceived and that it ought to be dismissed with costs. The issue before this court was whether the defendant had wrongly terminated the contract, which according to the plaintiff had caused it to suffer losses in the form of special damages.

Held, dismissing the plaintiff's claim with costs:

(1) The plaintiff could not say with a straight face that there had not been a delay, in fact there had been serious delays committed by the plaintiff that had impacted adversely on timely delivery of the two tugboats thereof to the defendant. The delays had not been an isolated incident but had been

continuous in nature. From the continuous delay in delivering the tugboats, the defendant was, in all fairness, entitled to throw up the contract. So, when the defendant had made the call on the bank performance bond a day before the due date, it was actually acting, for all intent and purposes, within its legal rights (see para 7).

(2) The LOA between the parties was about the delivery of the SHEMA and the SHETA to the defendant, not the supply and delivery of substitute tugboats of similar specifications. In fact, the evidence in this case had shown quite clearly that the plaintiff had been found to be wanting in fulfilling the terms of the LOA in that fundamental regard. On the balance, it was clear that the plaintiff was in breach of the terms of the LOA and not otherwise (see para 9).

(3) The plaintiff had failed to prove its case against the defendant for wrongful termination of agreement on the balance of probabilities. On the contrary, it appears from the evidence, that it was the plaintiff who had committed breaches of the LOA. As such, since the defendant did not commit any breach with regard to any of the terms of the LOA, the question of special damages arising out the alleged losses incurred by the plaintiff, as a direct result therefrom, does not arise. Neither was there any justification to award any exemplary damages to the plaintiff, as there was no evidence that the defendant had blatantly acted in unlawful defiance of a government directive. There was also no evidence of mala fide that had actuated the defendant when it initiated the alleged suit against the plaintiff. Instead, it was just prosecuting its legal rights as provided for within the LOA (see para 10).

[Bahasa Malaysia summary

Pihak-pihak dalam kes ini bersetuju untuk memasuki *charter parties* ('*charter parties* tersebut') yang mana mereka berjanji bahawa mereka akan berusaha sebaik mungkin untuk menandatanganinya secepat mungkin. Sementara penandatanganan *charter parties* tersebut, pihak-pihak bersetuju untuk terikat dengan terma-terma dan syarat-syarat yang terkandung di dalam surat award ('SA'). Berikutan SA, plaintif telah bersetuju untuk membekalkan kepada defendan dua bot tunda, iaitu SHEMA dan SHETA. SHEMA dan SHETA sepatutnya dihantar, masing-masing pada 17 Disember 1998 dan 17 Januari 1999. *Charter parties* tersebut berkaitan dengan dua bot tunda ini adalah untuk tempoh 15 tahun. Jika gagal membekalkannya, plaintif akan bertanggungjawab untuk memberikan kepada defendan bot tunda ganti dengan spesifikasi yang serupa atau secara alternatif, defendan mempunyai pilihan untuk memperoleh bot tunda ganti dengan sendiri daripada sumber lain. Walau bagaimanapun, plaintif gagal menghantar dua bot tunda seperti di dalam terma-terma yang terkandung di dalam SA. Terdapat juga ketidak penandatanganan *charter parties* tersebut kerana plaintif telah gagal menandatanganinya. Tuntutan plaintif di sini terhadap defendan adalah untuk

kerugian yang dikatakan dialaminya disebabkan oleh akibat langsung 'premature and unlawful termination' oleh defendan, perjanjian di antara mereka. Defendan walau bagaimanapun, menafikan apa-apa liabiliti dan menyatakan bahawa tuntutan tersebut disalah tanggap dan bahawa ia sewajarnya ditolak dengan kos. Isu di hadapan mahkamah ini adalah sama ada defendan telah secara salah membatalkan kontrak tersebut, yang menurut plaintif telah menyebabkannya mengalami kerugian dalam bentuk ganti rugi khas.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Plaintif tidak boleh menyatakan dengan jelas bahawa tidak ada kelewatan, sememangnya terdapat kelewatan yang serius yang dilakukan oleh plaintif yang memberikan impak bertentangan terhadap penghantaran dua bot tunda kepada defendan. Kelewatan tersebut bukan insiden yang berasingan tetapi adalah bersifat berterusan. Daripada kelewatan yang berterusan dalam menghantar bot tunda tersebut, defendan adalah, dalam kesemua keadilan, berhak untuk membatalkan kontrak. Dengan itu, apabila defendan meminta bon pelaksanaan bank sehari sebelum tarikh penghantaran, ia sebenarnya bertindak, untuk kesemua niat dan tujuan, dalam rangkuman haknya yang sah (lihat perenggan 7).

(2) SA di antara pihak-pihak adalah berkenaan dengan penghantaran SHEMA dan SHETA kepada defendan, bukan pembekalan dan penghantaran untuk bot tunda ganti dengan spesifikasi yang serupa. Pada hakikatnya, keterangan dalam kes ini telah menunjukkan secara jelas bahawa plaintif telah didapati hendak memenuhi terma SA dalam kaitan asasnya. Atas imbangan, jelas bahawa plaintif memungkiri terma-terma SA dan bukan sebaliknya (lihat perenggan 9).

(3) Plaintif telah gagal membuktikan kesnya terhadap defendan bagi pembatalan salah perjanjian tersebut atas imbangan kebarangkalian. Sebaliknya, dapat dilihat dari keterangan, bahawa adalah plaintif yang melakukan kemungkiran SA. Dengan itu, oleh sebab defendan tidak melakukan apa-apa kemungkiran berkaitan dengan mana-mana terma di dalam SA, persoalan ganti rugi khas yang berbangkit dari kerugian yang didakwa dialami oleh plaintif, sebagai akibat langsung, tidak berbangkit. Juga tidak ada apa-apa justifikasi untuk mengawardkan apa-apa ganti rugi teladan kepada plaintif, kerana tidak ada keterangan bahawa defendan telah dengan jelas bertindak membantah secara tidak sah arahan kerajaan. Juga tidak ada keterangan mala fide yang mendorong defendan apabila ia memulakan guaman yang didakwa terhadap plaintif. Sebaliknya, ia hanya melaksanakan haknya dari segi undang-undang seperti yang diperuntukkan dalam SA (lihat perenggan 10).]

Notes

For cases on termination in general, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6099–6147.

Cases referred to

Chua Chay Lee and Others v Premier Properties Ltd [2000] 4 SLR 177, CA (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (folld)
Hock Huat Iron Foundry (suing as firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65; [1999] 1 CLJ 89, CA (refd)
Universal Cargo Carriers Corp v Citati [1957] 2 QB 401, HL (folld)

Legislation referred to

Contracts Act 1950 s 47
National Petroleum Act 1974 s 3

Liow Si Khoon (Liow & Co) for the plaintiff.
Liew Teck Huat (T H Liew & Partners) for the defendant.

Abang Iskandar J:

[1] In this case the plaintiff had claimed against the defendant for losses that it had allegedly suffered as a direct result of the defendant's 'premature and unlawful termination' of the agreement between them. It had claimed special damages amounting to RM34,992,329.66, general damages, specially for RM10,000,000 as exemplary damages for the defendant's flagrant attitude towards the directives of MTEN and other mala fide suits perpetrated against the plaintiff. It had also asked for interest at 8%pa on the RM10,000,000 from 27 June 2001 until full settlement (see para 37 of the statement of claim).

[2] The defendant had denied any liability and had urged that the claim was misconceived and that it ought to be dismissed with costs.

[3] After all was said and done, the issue that needed to be decided was whether the defendant had wrongly terminated the contract, which according to the plaintiff had caused it to suffer losses in the form of special damages. The two parties had agreed to enter into a charter parties ('the charter parties') which both parties had pledged they would use their best endeavour to execute as soon as possible. Pending the execution by both of them of the charterparties, both of them had agreed to be bound by the terms and conditions contained in the letter of award ('the LOA') dated 15 December 1997. This LOA was admitted as agreed document, as exh P1 in this trial (at pp 1–4 in bundle B3). Now, it was not disputed that via the LOA the plaintiff had agreed to supply to the defendant two tugboats, namely the SHEMA and the SHETA with daily rate of RM5,200 for each tug. The SHEMA was to be

delivered first, and the date 17 December 1998 was agreed upon as its date of delivery to the defendant by the plaintiff. In respect of the SHETA, it was scheduled to be delivered on 17 January 1999. The charter parties in respect of these two tug boats would be for a period of 15 years. As in most contracts of this nature, the plaintiff as supplier of the service, had to furnish the defendant with a bank guarantee for RM379,000 within two weeks of receipt of the LOA (exh P1) which the plaintiff duly complied with in this case. In the event of failure to so supply by the plaintiff, it was under an obligation to provide the defendant with a substitute tugboat of similar specifications or alternatively, the defendant had the option of procuring the substitute tug itself from other sources if there was a delay in delivering the tugboats by the plaintiff. All these were contained in the said LOA signed and issued on the 15 December 1997 which also contained a provision that required both parties to sign the charter parties with respect to the use of the two tugboats at an agreed hire rate between them for a period of 15 years.

[4] As things had turned out, the plaintiff had failed to deliver the two tug boats on time. In respect of the SHEMA, the plaintiff had informed the defendant during a meeting of both parties that it was not able to deliver the said tug a month before its due date which was set for the 17 December 1998. That meeting had taken place on 18 November 1998. The record of the meeting had shown at item 4 of the minutes of meeting that the plaintiff was unable to perform the said delivery of the SHEMA. The said minutes appear as exh P37 at pp 20–22, bundle B1. It was also recorded in the minutes of meeting marked as exh D40 that in July 1999, the plaintiff was just launching the SHEMA. That, it must be noted was about seven months after the due date for its delivery had come and passed. In fact, that was not the end of the waiting game for the defendant because the plaintiff subsequently informed the defendant that the SHEMA would be put on sea trial by the 15 October 1999 and that it would be delivered for service to the defendant by 1 November 1999 and latest by 15 Novemebr 1999. The evidence on these facts was contained in the minutes of meeting between the parties that had taken place on the 23 September 1999 which was exhibited in this trial as D41 (pp 78–79 of bundle B1). Still on the 15 November 1999 the plaintiff had not delivered the SHEMA to the defendant. When the SHEMA was finally delivered to the defendant on the 2 January 2000, it was over a year later than was stipulated in the LOA. From the above saga, it was clear to my mind that the plaintiff had been unable to comply with the terms of delivery of the SHEMA despite undertakings having been given by the plaintiff itself that the delivery would be forthcoming on dates specified by them. Throughout the period between the stipulated date of delivery of the SHEMA as stipulated in the LOA until its eventual delivery on the 2 January 1999 the plaintiff did not furnish any substitute tug to the defendant in place of the SHEMA.

[5] Fourteen months down the road, on the 1 May 2001 the plaintiff had withdrawn the SHEMA from the services of the defendant, apparently for the purpose of dry-docking for a stipulated period of two weeks. No replacement or substitute tug was provided by the plaintiff to the defendant for that period when the SHEMA was being dry-docked. A replacement tugboat was given in its place but the defendant had found it to be not of similar specifications as required and although a notice was given by the defendant to the plaintiff of the unacceptable situation pertaining to the substitute tug, the latter took no conspicuous action to remedy the situation. Although the SHEMA was purportedly meant for dry-docking for two weeks, it was never returned to the defendant and the latter had to hire a replacement tugboat at a price to cover the gap created by the non-availability of the SHEMA. As regards the SHETA, it was never delivered to the defendant despite a lot of indulgences given to the plaintiff after the plaintiff had indicated that it was unable to deliver the SHETA on time. As could be recalled, the SHEMA was only delivered on the 2 January 2000 instead of the December 1998. The SHETA was supposed to be delivered in January 1999.

[6] The charter hire agreement was never executed by the plaintiff despite a clear exhortation on both parties to do just that in the LOA. A number of reasons were forwarded by the plaintiff for its omission to execute the same. According to the witnesses called by the plaintiff it was caused by the fact that the plaintiff was not able to agree to the terms and clauses in the charter parties. One of the witnesses for the plaintiff even went to the extent to say that the minutes of meeting alluding to the matter was wrong and that it did not reflect what transpired during the meeting. However that same assertion was contradicted by the other witness of the plaintiff who had signed and verified the contents of the minutes as having reflected the essence of the said meeting. From the nuances and tenor of the evidence led on this issue, what had become clear was that the plaintiff was hopeful that the charter hire rate could be raised by 20% from the agreed rate in the LOA in view of the economic crisis prevailing at that time. The plaintiff indeed had appealed to Petronas, the government [NEAC] and the Ministry of Finance in that regard. But all such attempts were not successful as Petronas and the defendant were firm and steadfast in their stand that to accede to the plaintiff's request would be unfair to the other bidders as the plaintiff winning price bid was only about 1.5% lower that the nearest competitor and that by asking for a 20% rate hike on the charter hire it would not only be unfair, in fact it would actually mean that the defendant would have to pay an amount nearly the same as cost of the tugboat itself. So, it was not a commercially viable proposition coming from the plaintiff. In other words, it was an offer coming from the plaintiff which the defendant could afford to accept. Actually, I agree with learned counsel for the defendant's contention that the failure of the plaintiff to sign the charter-hire agreement had been actuated by its desire to raise the charter hire rate, which the defendant could not agree to. The plaintiff had also contended that the

defendant ought to have abided by the NEAC's and the Minister of Finance's urgings to government agencies, including Petronas, to assist shipbuilders, such as the plaintiff, in the light of the economic situation prevailing at that time which was adversely impacting on people like the plaintiff, by raising the rate of the charter hire. A reference was made by learned counsel for the plaintiff to the statute namely the National Petroleum Act 1974 that had constituted Petronas, in that Petronas was under a mandatory duty to adhere to the directive given by the Prime Minister. It was undeniable that the chairman of NEAC was the Prime Minister and it was also not denied that the Minister of Finance was the Prime Minister as well. But looking at the relevant documents before this court on this matter, I am of the considered view that the correspondences to Petronas were not 'directive' as envisaged by s 3 of the said National Petroleum Act 1974. As such, I agree with Mr Liew, learned counsel for the defendant, that Petronas was not obligated so to follow the 'urgings' emanating from the Minister of Finance (albeit the Prime Minister) who had requested that Petronas consider the appeals forwarded by the plaintiff on the matter of hiking the charter hire in respect of the two tugboats, namely the SHEMA and the SHETA. Such was the position when the government wrote to Petronas on 17 January 2002 (exh P21 at p 37 of bundle C) whereby *both* parties were advised to drop their respective claim against each other, and that the matter should be resolved amicably between them. In fact, the defendant had dropped its claim against the plaintiff for the breach of the LOA on such advice but the plaintiff had persisted with this action against the defendant. I found that there was no statutory non-compliance by Petronas in this case in particular with regard to s 3 of the said National Petroleum Act 1974. In fact, looking at the pleadings in the plaintiff's statement of claim, the issue of illegality on the part of the Petronas with regard to this matter surrounding the circumstances relating to the handling by the latter of the plaintiff's numerous appeals, was ostensibly not pleaded therein.

[7] So, it was apparent from the evidence that the two tugboats were not delivered as per the terms as contained in the LOA. There was also non-execution of the charterparties as the plaintiff had failed to append its signature onto it. The plaintiff had argued that term relating to time stipulated for the delivery of the two tugboats was not of the essence of the agreement between them. It was submitted by learned counsel for the plaintiff that nowhere was it stated in the LOA that time was to be of the essence. It was reiterated with reference to the evidence of one practicing lawyer, PW2 who was called to testify on behalf of the plaintiff, who in the course of his evidence had said: 'It is also my observation that the Letter of Award does not expressly stipulate that time shall be of the essence.' (See, his answer to Q 9 during EIC). On this score, the defendant had argued that granted that time was not of the essence in this LOA, still in order for a departure by the plaintiff from meeting the set timelines as stipulated in the LOA, to be acceptable in law, it must be one that ought to be *reasonable* under the circumstances of each particular case.

In this case, the matter of delay in delivering the two tugboats to the defendant could hardly be denied. Evidence on that matter abounded as recorded in the proceedings in this case. The fact that the plaintiff had relied on the argument that time was not of the essence clearly pointed to the fact that there was delay on its part to deliver the two tugboats to the defendant. Indeed, he had submitted that '…the existence of Clause 5(e) in the Letter of Award, has by necessary implication, sanction the extension of the respective original datelines of Shema and Sheta, and the parties indeed adopted the application of clause 5(e) (i e usage of substitute tugs in the actual implementation of the contract'. To my mind, one material factual occurrence had been established through the testimonies of witnesses from both sides of the divide, namely there were a series of delays in the delivery of the two tug boats. The only issue to be resolved in relation to that fact would be whether such delays were justified so as to disentitle the defendant from throwing the contract away and say, 'enough is enough'. So, how would the law provide for this kind of situation? Now, s 47 of the Contracts Act 1950 is the operative legal regime meant to address such a predicament. And it is clear in terms of its provision in that regard. Indeed in the 'Explanation' to that section, it has been stipulated that 'the question 'what is a reasonable time' is, in each particular case, a question of fact'. Learned counsel for the plaintiff, Mr Liow had submitted before this court the case of *Hock Huat Iron Foundry (suing as firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65; [1999] 1 CLJ 89 where Justice NH Chan had said, after reiterating the words used in s 47 of the Contracts Act 1950, as follows 'But where one party has been guilty of unnecessary delay the other may give him a notice fixing a reasonable time at expiration of which he will treat the contract as at an end.' The case for the plaintiff had been that the defendant had not been patient to wait for one more day before terminating the agreement. Based on that, the defendant had, as was contended by the learned counsel for the plaintiff, run foul of the law on termination. Let us look at the facts of this case. To my mind, the plaintiff could not say with a straight face that there had not been a delay, in fact there had been serious delays had been committed by the plaintiff that had impacted adversely on timely delivery of the two tugboats thereof to the defendant. The delays had not been an isolated incident but had been continuous in nature. What ought to be the legal position in such a case? In such a situation, the legal position was rightly adverted to by learned counsel for the defendant when he cited the case of *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, wherein the court there had explained the applicable legal principle to be as follows 'Where time is not the essence of the contract-in other words, where delay is only a breach of warranty-how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it.' In this case before me, the evidence pointing to the plaintiff's non-performance to deliver the tugboats for use by the defendant was so clear for all to see. Indeed, such a

A situation was explained by Devlin J (as he then was) in the *Citati* case thus ' … as a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it follows that the breach which he anticipates is of the same character as the breach which would actually have occurred if he had waited.' This case was cited with approval by the Singapore Court of Appeal in the case B of *Chua Chay Lee and Others v Premier Properties Ltd* [2000] 4 SLR 177. From the circumstances obtaining in this case, it was clear to my mind that the plaintiff was unable to perform its side of the bargain as contained in the LOA. I cannot see what difference could one day make in terms of the plaintiff delivering the tug boats to the defendant. At the point of time when the C defendant terminated the contract with the plaintiff, the SHEMA was not returned to the defendant although it was way past its guaranteed dry docking period and the SHETA was not yet delivered to the defendant at all. From the continuous delay in delivering the tugboats the defendant was, in all fairness, entitled to throw up the contract and indeed the defendant was in a position D that was so succinctly described by Justice Devlin J (as he then was) in the *Citati*'s case, as follows ' … as a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it follows that the breach which he anticipates is of the same character as the breach which would actually have occurred if he had waited.' So, when the defendant had made the call on the E bank performance bond a day before the due date, it was actually acting, for all intent and purposes, within its legal rights. Indeed, the situation is akin to the one obtaining before the court in the case of *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23, where the plaintiff had complained to the court that the defendant had wrongfully terminated the agreement but had found no favour F from Justice Edgar Joseph Jr J (as he then was), who instead said 'I am satisfied that even had a valid notice to complete had been served on the plaintiff, in view of his lack of financial resources, the plaintiff would not have been able to complete with a valid notice to complete if it had been given and so the plaintiff was in anticipatory beach by reason of impossibility of performance.'

G

[8] Before I conclude, there was another matter that related to the interpretation of a particular term of the LOA. Specifically it was concerned with the true intent of cl 5(e) of the LOA. I would reproduce the said clause below for ease of reference 'SMSB shall procure substitute tug boat(s) of H equivalent specifications in the event of and for the period of delay in delivery after the stipulated delivery dates as per item 5(d) above at the same daily charter rate. KPSB shall have the option to procure tug boats from other sources in the event of delay or non-delivery of the tug boats or substitute on the appointed date and time. Any additional costs incurred by KPSB for this I action shall be borne by SMSB.' Now, the plaintiff was of the view that as long as it could provide the substitute tug to the defendant it would not be in breach of the LOA as time to deliver the two tugboats was not of the essence. The defendant, on the other hand was of the view that the thrust of the LOA had been the delivery of the two tugboats by the plaintiff to the defendant on the

specified dates as stipulated in the LOA. Now, as was seen earlier in this judgment although time was admittedly not of the essence, the law as it stood then and as it stands now, has provided that the delay in the fulfillment of the contract must be reasonable in the circumstances of each particular case. What the law does not provide for is that though time may be at large, the delaying party is given a free and unlimited leeway as regards the time as to when the goods contracted for ought to be delivered. In this regard, I would agree with the submission by learned counsel for the defendant that cl 5(e) of the LOA could not be read the way learned counsel for the plaintiff had wanted it to be construed. To my mind, the said cl 5(e) of the LOA was for all intents and purposes a 'fall back' clause in the context of the overall intent of the LOA. Its operation must be couched upon the happening of another event and in this case, the failure of the plaintiff to deliver the tugboats on time. But once it was invoked, it did not have life in perpetuity. In fact, such a clause as cl 5(e) of the LOA would be similar to a kind of a stop gap measure to address a situation on a short term basis. It was never meant to substitute the obligation of the plaintiff in this case to supply the tugboats within reasonable time frames as envisaged under the law. As to the stated obligation to deliver the two tug boats, it was contained in cl 5(d) of the LOA as follows 'SMSB, shall deliver the tug boats at Kertih Port, Terengganu, as follows i. Unit 1 to be delivered on 17th December 1998; ii. Unit 2 to be delivered on the 17th January 1999.' 'SMSB' referred to in the above clause has been the plaintiff in this case. In the light of the foregoing cl 5(d) of the LOA, this court could not agree with the contention by the learned counsel for the plaintiff that cl 5(e) on the provision of substitute tug boat ought to be construed as a stand alone clause capable of invocation on its own with blatant disregard for the express obligation on its part to deliver the two tugboats to the defendant for charter hire, which to my mind was the reason why this LOA existed between them in the first place. Clause 5(e) was meant as a stop gap measure so as to ensure that the operations of the defendant's business would not be materially compromised, in the event that the two tug boats, the SHEMA and the SHETA could not be delivered on time. To my mind, it was not meant to be a carte blanche handed to the plaintiff to be exercised by it in a manner that was contrary to the spirit of the LOA with regard to the delivery of the two tug boats.

[9] As such the position taken by the plaintiff must be viewed as a misconception of what the legal position ought to be with respect to cl 5(e) of the LOA. It was rather unfortunate if that stand taken by the plaintiff could have shaped its approach in the performance of its side of the bargain of the said LOA, for surely that cl 5(e) could never have been intended to have its own eternal life-span, so to speak, independent of the other clauses in the LOA. To my considered mind, the LOA between the parties in this case was about the

delivery of the SHEMA and the SHETA to the defendant by the plaintiff, *not* the supply and delivery of substitute tug of similar specifications. In fact the evidence in this case had shown quite clearly that the plaintiff had been found to be wanting in fulfilling the terms of the LOA in that fundamental regard. On the balance, it was clear to my mind that the plaintiff was in breach of the terms of the LOA and not otherwise.

[10] Under the circumstances obtaining in this case, the defendant was legally justified in making the call on the two performance bonds as the plaintiff had shown ample evidence of its incapacity to perform its side of the bargain. The case as established by the defendant was more compelling than that erected, as it were by the plaintiff. To my mind, the specific facts of this case before me had brought this case to be decided squarely on the principles as enunciated by such cases as *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 and *Goh Hooi Yin v Lim Teong Ghee & Anor* [1990] 3 MLJ 23. The plaintiff may get some sympathy for its financial predicament, but that predicament was not of the defendant's making and it had obligations under the LOA which it had failed to fulfill, *inter se*, vis-a-vis the defendant. The fact that the defendant had not waited for one more day before it had pulled the proverbial trigger could not, under the circumstances of this case be seriously considered as an issue that would merit serious consideration by this court. As such, the plaintiff had failed to prove its case against the defendant for wrongful termination of agreement on the balance of probabilities. On the contrary, it would appear from the evidence, that it was the plaintiff who had committed breaches of the LOA. As such, since the defendant did not commit any breach with regard to any of the terms of the LOA, the question of special damages arising out of alleged losses incurred by the plaintiff, as a direct result there from does not arise to be usefully considered.

[11] I also found that there was no justification to award any exemplary damages to the plaintiff as prayed for, as there was no evidence that the defendant had blatantly acted in unlawful defiance of a government directive. In any event, the issue of illegality in that regard was never pleaded by the plaintiff. I also found no evidence of mala fide that had actuated the defendant when it initiated the alleged suit against the plaintiff. Instead, it was just prosecuting its legal rights as provided for within the LOA.

[12] As such, having considered the evidence, I was of the view that the entire claim by the plaintiff against the defendant cannot be sustained and

must therefore be dismissed with costs and costs to be taxed before the senior assistant registrar. I had so ruled on the 31 December 2009.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed